IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATUTES

IN THE

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OCTOBER TERM, 1956

No. 905

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
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vs.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DECISIONS BELOW

The opinion of the District Court is reported in 136 F. Supp. 476. For opinion, findings and conclusions see Tr. 99-112, 151-160[1].

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 240 F. 2d 930 and is printed in appendix to petition, pp. 37-54.

[1] Copies of the printed transcript of record and the printed briefs of the parties filed in the Court of Appeals are filed here and are called "Tr." and "briefs." The appendices to the petition for certiorari are called "app. to pet."

STATUTES AND ORDINANCES INVOLVED

The Illinois statutes enumerated in the first paragraph of petitioner's "Statutes and Ordinances Involved," p. 3, and summarized p. 13, are not in any way involved in this case. No issues as to those statutes ever have been in this case.

The case involves only § 28-31.1 of Chapter 28 of the Chicago Municipal Code (app. to pet. pp. 34-35) and § 302 (c) (2) of Title 49, U. S. Code, set out in part in the opinion of the Court of Appeals (app. to pet. pp. 45-46) and in full in the appendix to this brief, p. 19. Section 302 (c) (2) is involved only incidentally here since petitioner is not seeking review of the construction of § 302 (c) (2) by the Court of Appeals.

STATEMENT OF THE CASE

The basic issue and the precise holding of the Court of Appeals are not made clear in the petition for certiorari. The first paragraph of "Reasons for Granting the Writ," p. 6, states that the Court of Appeals has held invalid "a most salutary city ordinance * * * for the protection of public health and safety, and for public convenience." The petition seems to imply, by the relation of the foregoing to the reference at the top of page 4, that all of Chapter 28 of the Chicago Municipal Code, insofar as it relates to "Terminal Vehicles," was held invalid. But this is not correct. Only § 28-31.1 of Chapter 28 (app. to pet. pp. 34-35) was held invalid. See the Court's Opinion (app. to pet. pp. 50-54). This section was added to Chapter 28 by the City Council on July 26, 1955 (Tr. 44-45). The Court's opinion leaves in effect all of the ordinance except § 28-31.1; it leaves in effect all of the provisions that Chapter 28 ever had "for the protection of public health and safety," covering most of pages 15 to 36 of appendix

to the petition. The sole issue is the constitutional validity of § 28-31.1, pp. 34-35.

The petition does not show how Chapter 28 was amended on July 26, 1955. This Chapter had been in effect for some years prior to that date. The amendment of July 26, 1955, added § 28-31.1 and changed the definition of "terminal vehicle" (Tr. 44-45). Before the amendment "terminal vehicle" was defined as follows (separate brief of appellant railroad companies, appendix p. 3):

> "'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]"

The amendment changed it to read (Tr. 44):

> "'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in section 28-31. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905; 7-26-55, p. 897.]"

The amendment, changing the definition of "terminal vehicle" and adding § 28-31.1, was prepared at the direction of the Committee on Local Transportation of the Chicago City Council after the Committee had been advised by Parmelee Transportation Company that the Chicago railroads had arranged to discontinue the use of Parmelee for the interstation transfer of passengers as of September 30, 1955 (Tr. 90-95). The Committee recommended passage of the amendment (Tr. 95) and it was passed as recommended (Tr. 44-45).

Respondents deny the statement on page 7 of the petition that this action was instituted as a "friendly suit."

That has no basis of fact, and the record proves the contrary. For example, the District Court's judgment denied respondents all relief and held respondents subject to § 28-31.1 of Chapter 28 (Tr. 160). Petitioner did its utmost by its brief in the Court of Appeals to obtain affirmance of this judgment (appellee's brief).

ARGUMENT

1.

Answer to Petitioner's First and Eighth "Questions Presented for Review."

Petitioner's first and eighth "questions presented for review", pp. 2, 3, may be considered together:

> "1. Did the courts below properly entertain jurisdiction on the constitutional question involving control of interstate commerce, when the paramount issue presented by the pleadings involved the construction of a city ordinance governed by state law.
>
> "8. Does Transfer operate 'terminal vehicles' as defined by the ordinance."

By "paramount issue" petitioner apparently means the issue whether the ordinance applies to respondents, for petitioner states in the last sentence of its argument, p. 12: "The basic question at issue between the city and the respondents is whether Transfer is a 'terminal vehicle' as that term is defined by the ordinance." (We do not agree. The paramount issue is the constitutional question. Tr. 6-7, 16-22, 103-108.)

Petitioner's questions 1 and 8 present no grounds for certiorari; indeed, these questions are not presented by the record. After the District Court entered its opinion (Tr. 99-112) petitioner filed proposed findings and conclusions that the ordinance applies to respondents and is valid, and a proposed judgment denying respondents' prayer for injunction (Tr. 117-122). The District Court held in accord with such proposals (1) that the ordinance is applicable to respondents, and (2) that the ordinance is constitutionally valid, and dismissed the action (Tr. 155-160). Respondents appealed. Petitioner vigorously urged the Court of Ap-

peals to sustain the District Court on both of the above points (appellees' brief). On the point of applicability petitioner told the Court of Appeals in part (appellees' brief pp. 12-13):

> "That the framers of the ordinance in question intended to regulate the business carried on by Transfer wholly within the City of Chicago is hardly subject to challenge. Appellants have themselves made pointed reference to the legislative history (R. 92), and the language of the ordinance leaves no room for doubt. For among the list of motor vehicles carrying passengers for hire which are made subject to the terms of the ordinance are *'terminal vehicles'*. A *'terminal vehicle'* is defined in the ordinance as 'a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area' bounded on the north by Ohio Street, on the west by Desplaines Street, on the south by Roosevelt Road, and on the east by Lake Michigan. Chicago Municipal Code, c. 28; §§ 28-1, 28-31. All of the railroad terminal stations are within this area. *A more accurate description of the business engaged in by Transfer would be hard to find.*" (Emphasis added)

The Court of Appeals held the ordinance applicable to respondents (app. to pet. pp. 47-48, 51-52) but held § 28-31.1 invalid because in conflict with the Interstate Commerce Act and the Commerce Clause (pp. 52-54).

It is therefore clear that the courts below did "properly entertain jurisdiction on the constitutional question", after having first held the ordinance applicable to respondents in accordance with petitioner's earnest prayers to that end. Thus there is no merit in petitioner's first question.

By the eighth "question presented", in connection with the first question, petitioner apparently is asking this Court to grant certiorari to review the issue of applicability despite the fact that that issue was decided in petitioner's

favor in both courts below. Petitioner is attempting, pp. 6-7, to invoke the principle that in a proper case, and irrespective of the positions of the parties, this Court can notice and rule upon a non-constitutional issue in order to avoid decision of a constitutional question. But this case cannot conceivably call for the application of that principle.

Petitioner does not make any showing whatsoever that a hearing in this Court on the question of applicability might produce a decision different from the two decisions already had in petitioner's favor on this issue in the two courts below. In that respect alone petitioner falls far short of stating a case for certiorari. We do not overlook petitioner's observations in respect to the definition of "terminal vehicle" stated in pages 8-11. These set forth no arguments of substance, and insofar as any clear statements can be gleaned from them they are totally demolished by petitioner's argument to the Court of Appeals set out above in this brief, p. 6.

Petitioner's extraordinary request calls for forthrightness that petitioner does not offer. If certiorari were granted would petitioner argue in this Court that Chapter 28 does not apply to respondents? No answer to that is supplied. If such an argument were made how could it be reconciled with the solemn assurances given the Court of Appeals, over the signature of petitioner's chief law officer, that Chapter 28 does apply? (appellees' brief, pp. 12-13). How could petitioner or its law officers answer the questions: "On which occasion were you serious? Will you switch your construction again when you deem it convenient?" Or, if petitioner wants certiorari in order to argue in this Court that Chapter 28 does apply, what is to be gained when the courts below have already so held?

The basic reason why this Court sometimes examines or re-examines a question of applicability of a statute where

a constitutional issue is involved, irrespective of the positions of the parties, does not come into play here. A decision of a Federal Court in Florida holding a Federal statute invalid may have important results in Oregon upon unrepresented interests. But here there is an ordinance of the City of Chicago, and in both courts below the Chief Law Officer of the City, and the Mayor, both parties below, officially advised the Courts that the ordinance is applicable to respondents and vigorously urged the Courts to accept that construction (Tr. 117-122; appellees' brief, pp. 12-13). Assuredly no principle calls for certiorari to permit the City to take a different position now. *City and County of Denver* v. *Denver Tramway Corporation,* 23 F. 2d 287, 296, C. C. A. 8th (1927), cert. den. 278 U.S. 616.

2.

ANSWER TO PETITIONER'S SECOND QUESTION

Petitioner states:

> "2. Should the courts below have decided the non-constitutional question of the applicability or meaning of the ordinance instead of remitting the parties to the state courts for determination of that question."

This is the first time in this case that anyone has suggested this procedure. No case is pending in the state courts. The District Court had discretion in the first instance whether to remit the parties to the Illinois Courts for the decision of questions of Illinois law, if there were any, or whether to retain that issue. *Doud* v. *Hodge,* 350 U.S. 485, 487 (1956); *Propper* v. *Clark,* 337 U.S. 472, 492 (1949). Petitioner filed in the District Court proposed findings of fact and conclusions of law that the ordinance was applicable to respondents and was valid (Tr. 117-122). The District Court so held (Tr. 154-160). Petitioner made no suggestion to the Court of Appeals that there existed any issue of Illinois law which should be remitted to the Illinois

Courts (appellees' brief). Petitioner did not present this question in its petition for rehearing (see copy). It is now too late for petitioner to raise the question. *C.ST.P.M.&O. Ry. Co.* v. *United States*, 322 U.S. 1, 3-4 (1944); *Propper* v. *Clark, supra*, 337 U.S. 472, 492; *Doud* v. *Hodge, supra*, 350 U.S. 485, 487.

In any event, however, no occasion has ever existed in the progress of this case that would permit remitting any issue to the Illinois Courts. The principal issues of law arise out of the construction of Federal statutes. The only questions of Illinois law in the case are either self evident on their face or already firmly settled by decisions of the Supreme Court of Illinois. Under these circumstances this Court does not remit issues to state courts.

Federal Statutes Involved

The interstation transfer service is being performed under the authority of 49 U.S.C. § 302(c)(2) as to more than 99 per cent of the transfers (Opinion of the Court of Appeals, app. to pet. pp. 45-47, 39, 43-44). Petitioner does not take exception to the conclusions of the Court of Appeals in respect to the rights conferred upon respondents by § 302(c)(2) (app. 47-52). Specifically, for one example, petitioner does not except to the Court's conclusions (app. 51) that by force of § 302(c)(2) petitioner has no power to deny or suspend the rights of respondents to operate the interstate portion of the transfer service. Petitioner has not asked the Court to review that conclusion. This Court commented on the rights given to the railroads by § 302(c) in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 67-68 (1945).

The Construction of "Terminal Vehicle"

Petitioner fails to present any argument that there is any uncertainty in the definition of "terminal vehicle" in the

ordinance or that Illinois courts would give the definition a construction different from that of the two courts below.

The definition is (app. to pet. p. 16):

> "'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transfer of passengers from railroad terminal stations and steamship docks to points within the area defined in section 28-31."

In respect to that definition petitioner told the Court of Appeals (appellees' brief pp. 12-13):

> "A 'terminal vehicle' is defined in the ordinance as 'a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area' bounded on the north by Ohio Street, on the west by Desplaines Street, on the south by Roosevelt Road, and on the east by Lake Michigan. Chicago Municipal Code, c. 28 §§ 28-1, 28-31. All of the railroad terminal stations are within this area. A more accurate description of the business engaged in by Transfer would be hard to find."

The definition of "terminal vehicle" before the amendment of July 26, 1955, was (appendix to separate brief of appellant railroads, p. 3):

> "'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies exclusively for the transfer of passengers from terminal stations."

This definition had covered the Parmelee interstation transfer service for the railroads for many years, so petitioner told the Court of Appeals (appellees' brief, p. 12). The new definition lacks the requirement of a contract with the railroads, but it is even more descriptive of the transfer of passengers between stations than the former definition, in that under the present definition the area of operation

is restricted to the area of railroad stations. Both the old and new definition cover the transportation of railroad passengers from terminal stations. The new definition restricts the destination to an area narrowly bounding all the stations involved. On its face the definition clearly includes respondents and petitioner has always so contended until now.

In a case involving a serious question of construction of a state statute this Court accepted the construction contended for by the state authorities in the District Court and held the act unconstitutional under that construction. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 76 (1937). The instant case is much stronger than that one, because no showing has been made by petitioner that an Illinois Court would give the clear terms of the definition of "terminal vehicle" any other meaning than that given by the courts below.

In *Propper* v. *Clark*, *supra*, 337 U.S. 472, 492, the Court said:

> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia* Case, 309 U.S. 478; *Spector* Case, 323 U.S. 101; *Fieldcrest* Case, 316 U.S. 168; and the *Pullman* Case, 312 U.S. 496, all *supra*, but in the absence of special circumstances, 320 U.S. at 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy."

There are no "special circumstances" in this case which would authorize any procedure looking to remission of this case to the state courts. Instead, all of the circumstances, ordinary and special, are against that procedure.

THE CONSTRUCTION OF "PUBLIC CONVENIENCE AND NECESSITY"

It is not clear whether petitioner contends that the construction of "public convenience and necessity" in § 28-31.1 of Chapter 28 (app. to pet. p. 35) ought to be remitted to Illinois courts. This phrase has a fixed meaning in Illinois law, established by decisions of the Supreme Court of Illinois construing the phrase in the Illinois Public Utilities Act, Ill. Rev. Stat., 1955, Ch. 111⅔, § 56, Laws of 1913, p. 460, Laws of 1921, p. 731. See Appendix hereto p. 20. This construction is binding on the Federal courts.

The Illinois Court holds uniformly that this phrase includes only economic regulation of carrier service, such as the determination of which one of two or more competitors shall be selected to perform the service, protection of an established carrier against the entry of new competition, determination of economic benefit to the public, and similar purely economic considerations.[2]

Section 28-31.1 of Chapter 28 (app. to pet. pp. 34-35) was copied from § 28-22.1 of Chapter 28 (pp. 29-30). Section 28-22.1 regulates taxicabs. In *Yellow Cab Co.* v. *City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652 (1947), it was held that "public convenience and necessity" in § 28-22.1 of Chapter 28 comprehends the power to limit the number of taxicab licenses to avoid the economic distress among taxicab operators that would be caused by an over-supply of taxicabs.

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[2] *Egyptian Transportation System* v. *Louisville and Nashville R.R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926); *Eagle Bus Lines, Inc.* v. *Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc.* v. *Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line* v. *Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp.* v. *Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926); *The Commerce Commission* v. *Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936).

It is clear from the minutes of the meetings of July 21, 1955, and July 26, 1955, of the Committee on Local Transportation of the Chicago Council (Tr. 93-96) that the Committee intended to impose "public convenience and necessity" regulation upon the successor of Parmelee Transportation Company in the interstation transfer of passengers, that is, upon the operator of "terminal vehicles." This shows the plain legislative intent, if it needs so to be shown, that "terminal vehicle" includes respondents' transfer service.

Under the Illinois decisions above cited, "public convenience and necessity" means economic regulation that is beyond the power of the states as to Interstate Commerce. *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316 (1925).

Answer to Petitioner's Third Question

Petitioner states, p. 3:

> "3. Does the record support the conclusion of the Court of Appeals that counsel for the city who drafted the ordinance, as a substitute for a proposed special franchise to Parmelee Transportation Company (hereafter 'Parmelee'), objected to the form and not to the substance of the ordinance first proposed."

The petition fails to reveal that the suggested error would be prejudicial. However, it is clear that there is no error.

Petitioner's own *official* record of what transpired in the meeting of the Committee on Local Transportation of July 21, 1955, is the following from the Committee's minutes, duly certified as a true and correct official record of petitioner by petitioner's city clerk (Tr. 94):

> "Mr. Grossman, who was present at the request of the committee, stated that he had looked over the

> ordinance as introduced by Chairman Sheridan and is of the opinion that the ordinance is not in proper form; but that he believes the objective can be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject to the committee before the next meeting."

These minutes are "the only lawful evidence of the action to which they refer." (*Western Sand & Gravel Co.* v. *Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954). The minutes were introduced in evidence on November 21, 1955 (Tr. 93), and were not objected to in any manner until after the decision of the Court of Appeals on January 17, 1957.

We submit that petitioner cannot object to the Court's quoting petitioner's own official record.

A reporter's transcript of the meeting of July 21, which is not identified as a record of petitioner, contains the following (Tr. 91):

> "Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council."

We submit that an ordinance that is not "within the corporate power" is "not in proper form," and we submit any difference in any event is *de minimis*.

4.

ANSWER TO PETITIONER'S FOURTH QUESTION

The Court of Appeals stated no such conclusion as the one attacked. Petitioner does not attempt to point to any

such conclusion in the Court's opinion. Petitioner apparently is here referring to its own official committee minutes (Tr. 93-96) which were quoted in part by the Court of Appeals (app. to pet. pp. 42, 43, 50-51).

5.

ANSWER TO PETITIONER'S FIFTH QUESTION

Petitioner states:

> "5. Was the Court of Appeals justified in considering the motives of any member or members of the city council to determine the meaning, purpose or effect of the ordinance."

Petitioner argues, p. 11, that "it is not the function of the Federal Courts to question the motives of a legislative body."

Petitioner's argument and authorities are not apposite. The cases cited did not involve the well-established principle of the right and duty of the courts to resort in a proper case to the materials of legislative history to ascertain legislative intent. The rule applicable here is stated in several harmonious Illinois and Federal decisions.

In *City of Rockford* v. *Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921), the Court said, in words closely applicable to the instant case:

> "The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, *and the apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co.* v. *Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

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SUBJECT MATTER

ARGUMENT

1.

THE QUESTION OF THE APPLICABILITY OF THE ORDINANCE IS NOT BEFORE THE COURT

In both Courts below petitioner obtained judgments requested by petitioner that Chapter 28 of the Chicago Municipal Code is applicable to respondents' interstation transfer operation. Petitioner cannot now take the position that the Courts below erred in agreeing with petitioner or that the question is open for decision 13

2.

NO OCCASION EXISTS FOR REMISSION OF ISSUES TO ILLINOIS COURTS

Petitioner makes no attempt to point to any ambiguity in Chapter 28, and none exists. The ordinance is clear and petitioner fails to point to any error in its construction by the Courts below. No occasion exists for remission of issues to the Illinois Courts 16

3.

RESORT TO LEGISLATIVE HISTORY WAS PROPER

Section 28-31.1 is invalid on its face, and the Court of Appeals so held without resort to legislative history. But petitioner argued that the words of § 28-31.1 should be given a meaning different from that accorded them by the Supreme Court of Illinois and by this Court. To consider that argument the Court looked to the report of the City Council Committee recommending § 28-31.1 for passage. It should be

AUTHORITIES CITED

Cases

> "The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

> "Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Boshuizen* v. *Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

> "For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

The materials of legislative history here used were petitioner's own "public official documents," the minutes of the Committee on Local Transportation (Tr. 93-96). They are "the only lawful evidence of the action to which they refer." *Western Sand & Gravel Corpn.* v. *Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954). The minutes of July 21 and July 26, 1955, should of course be considered together. While this legislative history seems clearly relevant at all times under the authorities above cited, it would

become so under the narrowest possible construction of the principle of resort to extrinsic history by reason of petitioner's argument. Petitioner made an extensive argument to the Court of Appeals that the phrase "public convenience and necessity" as used in the ordinance did not comprehend economic regulation but meant only what petitioner characterized as permissible police power regulation (appellees' brief pp. 52-58). The Court's opinion adverts to petitioner's argument in this respect (app. to pet. p. 49), and then cites the legislative history in response to it (pp. 50-51).

6.

Answer to Petitioner's Sixth and Seventh Questions

Petitioner states:

> "6. Does the ordinance in effect give Parmelee perpetual control of terminal vehicle licenses in the City of Chicago, as indicated in the Opinion of the Court of Appeals.
>
> "7. Does the ordinance, in effect, bar Railroad Transfer Service, Inc. (hereafter 'Transfer') from the entire network of highways within the downtown area of Chicago, as stated by the Court of Appeals."

We do not find any argument in support of these questions anywhere in the petition.

The Court's conclusions are plainly correct. Section 28-31.1 of Chapter 28 (app. to pet. pp. 34-35) authorizes the "annual renewal" of the existing Parmelee licenses without proof of public convenience and necessity. Section 28-8 (p. 19) provides for substantially automatic "annual renewal" of existing licenses. Section 28-31.1 was copied from the taxicab section, § 28-22.1, and the latter gave perpetual control of taxicab licenses to licenses under it. *Vel-*

low Cab Co. v. City of Chicago, 396 Ill. 388, 71 N.E. 2d 652 (1947). Section 28-31.1 would permit petitioner to limit the number of licenses to those held by Parmelee by declaring that no more licenses are required by the public convenience and necessity.

Such economic regulation of interstate commerce is not within state or city power. *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316 (1925). By requiring submission to such unlawful demands before engaging in interstate commerce petitioner has unconstitutionally barred Transfer from the Chicago streets. *Barrett (Adams Express Co.)* v. *New York*, 232 U.S. 14 (1914); *Michigan Public Utilities Comm.* v. *Duke*, 266 U.S. 570 (1925); *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Lovell* v. *Griffin*, 303 U.S. 444 (1938), citing *Smith* v. *Cahoon*, p. 453; *Sault Ste. Marie* v. *International Transit Co.*, 234 U.S. 333 (1914). Perhaps it should be noted that petitioner admitted that unless restrained it would enforce these unlawful demands (Tr. p. 6, par. 4; pp. 17-21; 71-72).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SECTION 202 (c) OF THE INTERSTATE COMMERCE ACT.
49 U.S.C. § 302 (c).

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder, transportation or service, to which such services are incidental.

ILLINOIS REVISED STATUTES, 1955, CH. 111⅔, § 56, LAWS OF 1913, P. 460, LAWS OF 1921, P. 731.

§ 55. *Certificate of convenience and necessity—Alteration.* No public utility shall begin the construction of any new plant equipment, property or facility, which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.